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Read It and Weep

How the Tea Party's fetish for the Constitution as written may get it in trouble.

By Dahlia Lithwick

Posted Tuesday, Jan. 4, 2011, at 7:02 PM ET

Members of the Tea Party are really into the Constitution. We know this because on Thursday, House Republicans propose to read the document from start to finish on the House floor, and they also propose to pass a rule requiring that every piece of new legislation identify the source of its constitutional authority. Even Roger Pilon of the Cato Institute—its popular pocket version of the Constitution is only \$4.95!—agrees that these are largely symbolic measures, noting in the *Wall Street Journal* that as a legal matter, "at least since *Marbury v. Madison* in 1803, the Supreme Court has had the last word on what the Constitution authorizes Congress to do." Nobody has suggested that legislators don't have an independent duty to uphold the Constitution as they understand it. But that doesn't change the fact that the courts, not Tea Party Republicans—even those with the benefit of extra-credit classes from Justice Antonin Scalia—get to make the final call.

This newfound attention to the relationship between Congress and the Constitution is thrilling and long overdue. Progressives, as Greg Sargent

points out, are wrong to scoff at it. This is an opportunity to engage in a reasoned discussion of what the Constitution does and does not do. It's a n opportunity to point out that no matter how many times you read the document on the House floor, cite it in your bill, or how many copies you can stuff into your breast pocket without looking fat, the Constitution is always going to raise more questions than it answers and confound more readers than it comforts. And that isn't because any one American is too stupid to understand the Constitution. It's because the Constitution wasn't written to reflect the views of any one American.

The problem with the Tea Party's new Constitution fetish is that it's hopelessly selective. As Robert Parry notes, the folks who will be reading the Constitution

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aloud this week can't read the parts permitting slavery or prohibiting cruel and unusual punishment using only their inside voices, while shouting their support for the 10th Amendment. They don't get to support Madison and renounce Jefferson, then claim to be restoring the vision of "the Framers." Either the Founders got it right the first time they calibrated the balance of power between the federal government and the states, or they got it so wrong that we need to pass a "Repeal Amendment" to fix it. And unless Tea Party Republicans are willing to stand proud and announce that they adore and revere the whole Constitution as written, except for the First, 14, 16th, and 17th amendments, which *totally* blow, they should admit right now that they are in the same conundrum as everyone else: This document no more commands the specific policies they espouse than it commands the specific policies their opponents support.

This should all have been good news. The fact that the Constitution is sufficiently open-ended to infuriate all Americans almost equally is part of its enduring genius. The Framers were no more interested in binding future Americans to a set of divinely inspired commandments than any of us would wish to be bound by them. As Justice Stephen Breyer explains in his recent book, *Making Our*

Democracy Work: A Judge's View, Americans cannot be controlled by the "dead hands" of one moment frozen in time. The Constitution created a framework, not a Ouija board, precisely because the Framers understood that prospect of a nation ruled for centuries by dead prophets would be the very opposite of freedom.

The wonderful Garrett Epps writes today that if Tea Party Republicans really *listen* to the Constitution, they will quickly realize that "the document they are hearing is nationalistic, not state-oriented; concerned with giving Congress power, not taking it away; forward-looking, not nostalgic for the past; aimed [at] creating a new government that can solve new problems, not freezing in place an old one that must fold its hands while the nation declines." So long as there are fair-minded judges on the bench, the Constitution will be read for

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what it actually says, and not what any one results-oriented group or faction wants it to be.

In a thoughtful essay on *Salon*, Michael Lind contrasts "the semi-religious reverence with which the Founders or Framers or Fathers of the Constitution" are regarded, with the endless and casual amendments to the constitutions of the 50 states. He wonders why we fetishize the perfection of the federal constitution and embrace the idea of workable, mutable state constitutions. That question raises another problem with the states'-rights obsession of some of the current Tea Party Republicans: Some of the constitutional rhetoric—whether it's talk of two-thirds of the states being allowed to nullify laws or threats to repeal the 17th Amendment (which allows for the direct election of senators)—seem to confuse increased state power with greater individual freedom.

Taking legislative authority away from the federal government doesn't necessarily mean freer individuals. It might just mean granting vastly more authority to the states—which already have far broader police powers than most of us would care to admit. "Most of the regulation in our lives comes from state regulations over health, education, safety and welfare," explains Lawrence Friedman, a professor at New England

Law, Boston. "We have this idea that if the Congress can't do it, no one can do it, but it's not clear that the states wouldn't do it, and do a worse job." State governments are as likely to be corrupt, bankrupt, and beholden to special interests as the federal government. The only difference may be that state constitutions don't prohibit state legislatures from making you do things you'd rather not do.

Prof. Robert Williams of Rutgers University School of Law, Camden, notes that states have what's called "plenary authority" over much of what isn't spelled out elsewhere, which explains why Massachusetts can force you to purchase health insurance and why some states have much more stringent environmental regulations than the federal rules would require. As a political matter, this might not be worrisome if you live in, say, Idaho, where

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overregulation is not a concern. But as a constitutional matter, that's an enormous amount of potential authority the Tea Party is willing to shift to the states.

Real libertarians would acknowledge that dysfunctional state legislatures pose as great a threat to individual liberty as a dysfunctional Congress. But this point is frequently elided in discussions about the urgent need to restore state's rights in order to make us all more free. Partly that's because the goal here is to thwart the federal government, period. And partly there is some confidence that if red states ultimately get redder, everyone is going to be freer. Try telling that to a woman seeking reproductive freedom in Virginia. To be sure, the question of federal/state authority to regulate is a complicated one. But shifting vast regulatory power from Congress to the states isn't necessarily the shortest path to individual liberty.

Reasonable people can differ about constitutional values and systems. There's probably no better evidence for that than the Constitution itself. But it doesn't get less nuanced or complicated just because you've read it aloud. It merely gets harder to hear the other side.

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